

Mailed:

**THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB**

March 30, 2005  
GDH/gdh

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Life Extension Foundation, Inc.  
v.  
Nutraceutical Sciences Institute

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Opposition No. 91154495 to application Serial No. 76391287  
filed on April 3, 2002

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Ryan T. Pumpian of Powell Goldstein LLP for Life Extension  
Foundation, Inc.

Stewart L. Gitler of Hoffman, Wasson & Gitler, P.C. for  
Nutraceutical Sciences Institute.

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Before Quinn, Hohein and Walters, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Nutraceutical Sciences Institute has filed an  
application to register the mark "LEF" for "nutritional  
supplements."<sup>1</sup>

Life Extension Foundation, Inc. has opposed  
registration of applicant's mark, alleging as its sole pleaded  
ground that opposer, "since long prior to Applicant's use of LEF,  
has been continuously using, and is now using, the service mark

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<sup>1</sup> Ser. No. 76391287, filed on April 3, 2002, which is based on an  
allegation of a date of first use of the mark anywhere and in commerce  
of March 22, 2002.

and trade name LEF and the domain name www.lef.org in connection with its business of providing nutritional and dietary supplements, nutritional counseling services and magazines, brochures and leaflets"; that such use "has been valid and continuous since prior to Applicant's use of LEF and has not been abandoned"; that opposer, "since long prior to Applicant's use of LEF, has been continuously known as and is now known as LEF in connection with such business" and which name "is symbolic of extensive good will and consumer and trade recognition built up by Opposer through substantial amounts of time and effort in advertising and promotion"; and that "[i]n view of the similarity of Opposer's name and Applicant's mark and the related nature of the businesses and goods of the respective parties, ... Applicant's mark so resembles Opposer's name [as] previously used in the United States, and not abandoned, as to be likely to cause confusion, to cause mistake or to deceive."<sup>2</sup>

Applicant, in its answer, has denied the salient allegations of the opposition.

The record consists of the pleadings; the file of the involved application; and, as opposer's case-in-chief, the testimony deposition, with exhibits, of applicant's "CEO," Wayne Gorsek.<sup>3</sup> Applicant did not take testimony or otherwise properly

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<sup>2</sup> Although opposer also has alleged that "[s]imilarly, Applicant's mark may falsely suggest a connection with Opposer," such allegation was not pursued at trial or argued in the parties' briefs. Accordingly, no further consideration will be given thereto.

<sup>3</sup> (Dep. at 10.) It is noted with displeasure that the Gorsek deposition is not in conformity in its entirety with the requirements of Trademark Rule 2.126(a)(1). TBMP §703.01(i) (2d ed. rev. 2004).

submit any evidence. Both parties have filed briefs,<sup>4</sup> but an oral hearing was not requested.

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<sup>4</sup> Applicant, in its brief, refers to and relies upon two exhibits attached to its brief which were not made of record at trial. Exhibit A appears to be a printout of two pages of webpage advertising which, applicant asserts in its brief, shows that it "currently sells products bearing the LEF mark," while Exhibit B seems to be a copy of the front and back pages of an advertising brochure which, applicant contends in its brief, demonstrates that "[o]pposer sells only goods bearing the words 'LIFE EXTENSION MIX.'" Opposer, in its reply brief, has objected only to consideration of Exhibit A and, by a separately filed motion, has moved to strike such exhibit from applicant's "brief along with all related discussion of it." As the basis therefor, opposer argues that "[t]he materials ... attached as Exhibit A ..., purporting to show ... 'current' use of the trademark LEF, were not produced in discovery and, more importantly, were not made of record in ... [applicant's] testimony period." While applicant, in reply to the motion to strike, does not appear to contest opposer's assertion that "the evidence was not produced in discovery or made of record" at trial, applicant insists that such is due to the fact that likelihood of confusion "is the sole issue in the Opposition" and that it was not until opposer filed its brief that "the issue of current use was raised, [thereby] denying applicant the opportunity to properly submit evidence" with respect thereto.

As set forth in TBMP §801.01 (2d ed. rev. 2004) (footnote omitted), "[a] brief may not be used as a vehicle for the introduction of evidence." Furthermore, as indicated in TBMP §801.05 (2d ed. rev. 2004), "a party may move to strike evidentiary matter attached to a brief where the evidentiary matter was not properly made of record during the time for taking testimony." In the same vein, TBMP §539 (2d ed. rev. 2004) provides that (footnote omitted):

Evidentiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party. If evidentiary material not of record is attached to a brief on the case, an adverse party may object thereto by motion to strike ....

Likewise, as stated in TBMP §704.05(b) (2d ed. rev. 2004) (footnote omitted), "[e]xhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony" and, as set forth in TBMP §704.06(b) (2d ed. rev. 2004), "[f]actual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial."

In view thereof, opposer's motion to strike is granted. Applicant's Exhibit A is hereby stricken, see, e.g., Plus Products v. Physicians Formula Cosmetics, Inc., 198 USPQ 111, 112 n.3 (TTAB 1978), and the arguments in its trial brief with respect thereto have been given no consideration. Moreover, although not requested by opposer,

However, before turning to the ground of priority of use and likelihood of confusion, there is the matter of opposer's contested motion, filed with its reply brief, to amend the pleadings to conform to the evidence. Specifically, opposer maintains that "the parties tried by consent the issue of whether applicant ... ('NSI') used the trademark LEF in commerce as that requirement has been defined and interpreted under 15 U.S.C. §§ 1051(a) and 1127"<sup>5</sup> and consequently "requests that the Board find that NSI had fair notice that the use-in-commerce requirement was in issue and deem the pleadings amended to conform to the evidence presented in the case."

Preliminarily, by way of background, opposer asserts in its main brief that because "[t]he un-contradicted [sic] record evidence shows that NSI does not meet the Lanham Act's use in commerce requirement," applicant "has absolutely no rights in the Mark and has made no effort in this case to establish that it does." Following applicant's contentions in its brief that opposer's assertions are "unfounded and unrelated to the pleaded basis for opposition, [namely,] likelihood of confusion" and that

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in accordance with the above applicant's Exhibit B is also hereby stricken and the arguments with respect thereto, as set forth in both applicant's trial brief and opposer's reply brief, have been given no consideration (except, as noted later herein, to point out that such exhibit in any event does not constitute proof of priority of use by opposer).

<sup>5</sup> Section 1(a)(1) of the Trademark Act, 15 U.S.C. §1051(a)(1), provides in pertinent part that "[t]he owner of a trademark used in commerce may request registration of its trademark," while Section 45 of the Trademark Act, 15 U.S.C. §1127, defines "[t]he term 'use in commerce'" as meaning, in relevant part, "the bona fide use of a mark in the ordinary course of trade, and not ... merely to reserve a right in a mark."

opposer "may not rely upon an unpleaded claim," opposer argues in its reply brief that applicant "received fair notice and tried the use-in-commerce issue by consent." Opposer notes, with respect thereto, that "[i]n support of its argument that NSI's use of the Mark was mere token use," it "cited to Mr. Gorsek's deposition testimony in which he identified the one sale of a single container of product, made clear that absolutely no other use of the Mark had been made, and stated that he had no specific plans for using the mark. (Dep. at 23-24, 26-28, 46, 69)." Specifically, opposer insists in its reply brief that "Mr. Gorsek's testimony shows that NSI's use of the mark from its first (and only) use on March 22, 2002 through October 10, 2003, the date of his deposition, was *de minimus* and not bona fide."

The testimony of Mr. Gorsek, including that cited by opposer, provides in relevant part as follows:

Q So we think that the first use date that you're claiming is at least as early as March 22nd, 2002?

A Yes.

And on that date -- what did you do on that date ... to have that first use?

A I believe we had created some product and then we -- to test products we'll occasionally put them out into our lobby area. We've got some shelves there. And it would have been sold from the lobby of our office.

Q Do you routinely sell products from your office?

A Yes.

Q Do you have a storefront?

A I mean, it's the lobby of our office and we have displays of our products and we have numerous walk-in customer[s] every day. I guess that's routinely.

Q What product did you initially put this on?

A I believe it's the attached.

Q So alpha lipoic acid. This is the product that you first used the LEF mark on?

A Yes.

....

Q Are there any other products that you have used LEF on?

A No.

Q What products is the mark used on today?

A None currently.

Q So there's nothing in your storefront that has LEF on it, in your office?

A No.

....

Q What plans do you have to use the LEF mark? Specifically, what products do you intend to use it on?

A Numerous nutritional supplements. I don't have any specific plans for which ones. As you probably are aware, there's many hundreds of different types of vitamin products that you can launch, from Vitamin E to magnesium. So we have not yet made a decision on which ones and when we're going to launch them, but we plan to.

Q So at this point you don't have any specific products that you want to use LEF for?

A Other than making the statement that a line of nutritional supplements -- I can't sit here and tell you that as of right now we have plans to specifically launch XYZ.

Q You say you made this sale March 22nd, 2002 from your storefront. After that date was the product still on sale?

A I don't recall.

Q How many boxes or specific items of this product were on display at that point?

A I don't know.

Q Do you know how many were made?

A I do not.

Q Who manufactured the alpha lipoic acid that you sold under LEF?

A I don't know.

Q .... Well, was it NSI that manufactured the alpha lipoic acid?

A We don't have our own manufacturing. We utilize numerous outside sources, contractors.

....

Q You said you have at this point non-specific plans to market products using LEF. Do you have any written business plans that talk about your intent?

A No.

....

Q I understand that the LEF mark was used on this label. How else was the LEF mark used ... at the time of this first sale, March 22nd, 2002, or around there?

A I don't believe in any other way.

Q So other than this label no other product packaging?

A No.

Q Any advertising with regard to LEF?

A No.

Q Any use on the Internet or any websites?

A Well, we have LEF.com as a domain name. So I don't know if you count that or not as a use.

Q Were you advertising products under the LEF mark on that domain?

A No.

Q We'll talk about the domain a little bit later. At the time -- I'm focusing on time. Right there we're talking about March 22nd, 2002. Later, ... not even a month later, two weeks later ... we have the application, the April 3rd trademark application. Had anything changed in that two weeks with regard to how the mark was being used? And I mean --

A No.

Q -- specifically we have this label. Any other use?

A No.

Q No advertising, no Internet use?

A No.

Q Between the time period of filing the application and today, has there been any change in the way the mark has been used?

A No.

Q And as of today has there been any use of the mark in addition to this one label?

A No.



Q So ... all we have for the use of LEF is the sale on March 22nd, 2002?

A Yes.

Q And the domain name?

A Yes.

....

Q How much money has NSI earned from sales of products under the LEF mark?

A I don't know.

Q I think from what you said today we have the one sale in March of 2002.

A That would be -- if you're asking if that's the total sales, yes that would be it.

Q That's it. No other revenue besides that one sale?

A Yes, you are correct.

....

Q Who is Erica Schnorf?

A A customer.

Q Do you know her personally?

A I've met her, yes.

Q Does she have any business relationship with NSI?

A No.

....

Q It is my understanding that she was the person who purchased ... the LEF marked product, in March 2002. Is that correct?

A Yes.

Q How did that sale come about?

A I don't know. I assume she walked in and purchased across the counter.

Q So she just selected this product, picked it up, walked out? Why this product, why --

A I have no idea.

Q I mean, do you sell ... alpha lipoic acid from several different manufacturers?

A Yes.

Q Do you have any idea why she picked this one?

A No.

....

Q And with regard to Erica Schnorf, the person who purchased the LEF marked product, has she ever been an employee of [Vitacost's wholly owned subsidiary] NSI?

A No.

Q Have [sic] she ever been an employee of Vitacost?

A She was with Vitacost at one time.

....

Q At the time that she made this purchase in March of 2002, was she employed by Vitacost?

A I'm not sure.

....

Q How about, does she have a familial relationship with anyone at [Vitacost or] NSI?

A No.

(Dep. at 23-28, 46-47, and 69-70.)

Fed. R. Civ. P. 15(b), as made applicable by Trademark Rule 2.116(a), provides in pertinent part that:

**Amendments to Conform to the Evidence.**

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time .... If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. ....

With respect thereto, TBMP §507.03(b) (2d ed. rev. 2004) provides in relevant portion that (footnotes omitted):

When issues not raised by the pleadings are tried by the express or implied consent of the parties, ... the Board will treat them in all respects as if they had been raised in the pleadings. Any amendment of the pleadings necessary to cause them to conform to the evidence and to raise the unpleaded issues may be made upon motion of any party at any time ..., but failure to so amend will not affect the result of the trial of these issues.

Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue.

While we have considered opposer's numerous arguments as to why the pleadings should be deemed to be amended to include as a ground for opposition the alleged failure of applicant to

have made bona fide use of the mark "LEF" in commerce in connection with "nutritional supplements," we find no implied consent by applicant to the trial of such issue.<sup>6</sup> Specifically, while it is plain that applicant raised no objection to the introduction of evidence by opposer on the unpleaded ground until applicant submitted its trial brief, and in fact applicant's counsel did not even attend Mr. Gorsek's deposition, which was noticed by opposer as a deposition of applicant pursuant to Fed. R. Civ. P. 30(b)(6),<sup>7</sup> it is also the case that applicant was not fairly apprised during the taking of the deposition or seasonably thereafter that the testimony was being offered in support of the issue of the alleged absence of bona fide use in commerce. Instead, it was not unreasonable for applicant to assume that the testimony which opposer elicited from Mr. Gorsek pertained solely to the pleaded ground of priority of use and likelihood of confusion, with opposer seeking in particular to limit the

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<sup>6</sup> Although opposer is correct that, as asserted in its reply brief, "[u]se in commerce is a threshold requirement that every applicant must satisfy just to have its trademark considered for ... use-based registration," we find no merit to opposer's further contention that, in view thereof, "it is immaterial whether this ground was expressly pled in ... [the] Notice of Opposition." If, as claimed by opposer, applicant's application is void *ab initio* or otherwise deficient due to a lack of the requisite use in commerce and opposer desires to challenge applicant's right to registration on such basis, it is incumbent upon opposer to give applicant fair notice of the claim so that applicant, if it can and wishes to do so, may present its defense thereto.

<sup>7</sup> As opposer notes in its reply brief, "[o]nly discovery could reveal the inadequacy of applicant's use, as it did in this case." It is clear, moreover, that while nominally a testimony deposition, since such was taken during opposer's initial testimony period, the deposition of Mr. Gorsek as the representative designated by applicant as the most knowledgeable about the topics (including applicant's use of the mark "LEF") which are listed in opposer's notice of deposition is, in essence, a discovery deposition.

earliest date of use on which applicant could rely herein to a sale of a certain nutritional supplement under the mark "LEF" on a specific date. See, e.g., *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1629 (TTAB 1998) [while defendant did not object to testimony at trial, it was not fairly apprised that evidence, which related to existing pleaded claim, was also being offered in support of unpleaded claim]. Under such circumstances, to allow amendment of the pleadings at this late juncture would result in undue prejudice to applicant. Accordingly, opposer's motion to deem the pleadings to be amended is denied. Fed. R. Civ. P. 15(b) and TBMP §507.03(b) (2d ed. rev. 2004).

Nonetheless, while keeping in mind that, not only was the April 3, 2002 filing date of the involved application less than two weeks after applicant's claimed date of first use of its "LEF" mark in commerce on March 22, 2002,<sup>8</sup> but that applicant's nonuse of such mark thereafter may be excusable in large measure due to the uncertainty pending the resolution of this proceeding, which commenced on November 20, 2002, the facts herein still raise an issue as to whether applicant has made the requisite bona fide use of its mark in commerce. Specifically, a question remains as to whether the sale of applicant's goods under the "LEF" mark was in interstate (or other commerce regulable by Congress) and was sufficiently public in nature as to constitute bona fide use in commerce. In the event, therefore, that

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<sup>8</sup> Opposer, we note, contends in its reply brief that "the relevant time period for determining whether an applicant's use was bona fide ... is [as of] the date of the application, in this case April 3, 2002, not its use as of the date the trial brief is submitted."

applicant ultimately prevails in this proceeding, the application is remanded to the Trademark Examining Attorney pursuant to Trademark Rule 2.131 for reexamination concerning whether applicant has in fact made bona fide use of its "LEF" mark in commerce.

The principal issues to be determined herein are thus which party has priority of use and, if priority of use lies with opposer, whether there is also a likelihood of confusion. According to the record, applicant had its inception around 2000 or 2001 and is a wholly owned subsidiary of Vitacost.com, Inc., which had its inception in 1994. Opposer's witness, Mr. Gorsek, is CEO of both companies, each of which is in the business of selling nutritional supplements. He came up with the idea of using the letters "LEF," which are derived from the phrase "Longevity Enhancement Formulas," as "another brand of supplements." (Dep. at 13-14.) Prior to filing the involved application, Mr. Gorsek "went to the uspto.gov website and searched for LEF to see if there was any conflicting mark" (and did likewise with respect to the phrase "Longevity Enhancement Formulas"). (Id. at 15.) In seeking to register the "LEF" mark, Mr. Gorsek stated that such mark has no significance with respect to nutritional supplements, other than as a trademark for such, and that applicant intended to use the mark for nutritional supplements in general and did not intend to limit its use thereof to the alpha lipoic acid product shown on an actual label which was submitted as a specimen of use.

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Mr. Gorsek's testimony as to the particulars of applicant's first use of its "LEF" mark has been set forth in detail previously and thus need not be repeated. Suffice it to say that, even if applicant's claimed date of first use of March 22, 2002 is considered questionable, applicant may still rely herein for purposes of priority on the April 3, 2002 filing date of its involved application. See, e.g., Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974); Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960); Zirco Corp. v. American Tel. & Tel. Co., 21 USPQ2d 1542, 1544 (TTAB 1991); and Miss Universe, Inc. v. Drost, 189 USPQ 212, 213 (TTAB 1975). In addition, Mr. Gorsek testified that applicant purchased the "LEF.com" domain name over a year prior to his deposition, which as earlier mentioned was taken on October 10, 2003, and that the cost of such name, as best as he could remember, was in the "8 to 12,000 dollar range." (Id. at 28.) Later on in his testimony, however, he stated that he believed that the "LEF.com" website is actually owned by Vitacost.com, Inc., although he did recall from whom such website was acquired or what it was being used for at the time of its purchase. He noted, however, that applicant's current usage of the "LEF.com" website is to re-direct potential customers "to [the] vitacost.com" website. (Id. at 58.)

As would be expected from the absence of testimony from anyone connected with opposer, there is very little firsthand information concerning opposer and its activities. Mr. Gorsek testified that he has been aware of opposer for "[m]any years. I

can't recall. I mean, at least five years." (Id. at 30.) He noted that he first became aware of opposer when he "randomly" received "an ad or magazine or something" from opposer. (Id.) However, when asked if he was aware that opposer "uses LEF as an acronym for its name," he answered: "No." (Id.) When further asked if he had "never seen them use it," he again answered: "No." (Id. at 31.) Mr. Gorsek admitted, nonetheless, that for five years prior to his deposition, he has not only visited opposer's website for both personal and business reasons, but has done so "once every month or two." (Id.) His reasons for visiting such site, which he believes has the domain name of "Lifeextension.com," is because "[t]hey obviously sell nutritional products and have a lot of scientific information on their website." (Id.) Mr. Gorsek specifically testified, however, that while he could not recall if he has even been to a website bearing the domain name "LEF.org," he did "vaguely recall seeing that somewhere, but I don't know where." (Id.) Mr. Gorsek noted that he accesses the website "Lifeextension.com" by typing in such name from opposer's magazine, which he regularly receives "for some reason" even though he doesn't recall whether he is a subscriber and thus pays for such. (Id. at 32.)

When asked whether opposer is considered to be a competitor of applicant, Mr. Gorsek replied: "I'm not really sure. I haven't done that type of research." (Id. at 42.) While admitting that applicant and opposer sell similar products, when asked if applicant and opposer sell to and target their products to similar consumers, he answered: "That's what I don't



know." (Id.) More importantly, however, a careful reading of Mr. Gorsek's deposition reveals that he offered absolutely no specific testimony or other evidence as to what mark, trade name and/or domain name, if any, has been and/or is currently being used by opposer in connection with the sale of products conceded to be similar to those of applicant.

With respect to its goods, applicant advertises and sells vitamins and nutritional supplements through its nationally distributed mail-order catalog. Applicant also advertises and sells such goods directly to consumers by way of the Internet. Its "Gonsi.com" website, however, features only product information; customers wishing to purchase its goods are referred to its corporate parent's website, "Vitacost.com." Such website is the only authorized Internet seller of applicant's goods. In addition, as indicated previously, applicant also sells its goods from the storefront located at its offices, which are also the offices of its corporate parent, and there are some doctors who sell applicant's products to their patients. As to the particulars of any sales of applicant's goods under the mark "LEF," Mr. Gorsek testified that, while he does not know how much revenue applicant has earned therefrom, as noted earlier its total sales thereunder consist of the single storefront sale to Erica Schnorf which took place on March 22, 2002.

Finally, Mr. Gorsek indicated that in addition to selling applicant's goods, its corporate parent, Vitacost.com, Inc., at one time sold opposer's products but no longer does so. Sales of opposer's products, he testified, began "about a year

ago" in order "[t]o give consumers more choice" and lasted for about a year or less. (Id. at 52 and 54.) He further testified that the reason why such sales ceased was due to an inability to make a profit thereon:

Q Did you make a decision to stop selling Life Extension products?

A Yes, we were basically forced to stop selling them.

Q Why?

A Because Life Extension without notice raised the price to us substantially to basically what the consumer can buy them at, so we have no margin.

(Id. at 52.)

Turning to the issue of priority of use, opposer (referring to itself as "LEF" and to applicant as "NSI") contends in its main brief that (footnote omitted):<sup>9</sup>

There is no dispute that LEF has priority of use of the Mark over NSI. At his October 2003 deposition, Mr. Gorsek testified that he had been aware of LEF for at least five years and that he regularly visited LEF's website ([www.lef.org](http://www.lef.org)), which is printed on its magazine. (Gorsek Dep. at 30-32). This time frame puts LEF's use long before NSI's alleged first use date of March 22, 2002.

Opposer's assertions, in significant part, are glaringly at odds with the record. As detailed above, Mr. Gorsek testified that, while he has been aware of opposer for "at least five years" (id. at 30), he is not aware of whether opposer uses the term "LEF" as

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<sup>9</sup> While, in a footnote, opposer argues that its "use of the Mark on its magazine and as its domain name is a least sufficient to constitute analogous trademark use for purposes of priority," opposer failed to introduce any evidence of its actual use of any mark or domain name.

an acronym for its name and, in fact, further indicated that he had never seen opposer use it. Moreover, while conceding that for five years prior to his deposition, he not only has routinely visited opposer's website "once every month or two" for both personal and business reasons (id. at 31), he believes the domain name of such website, which he admits sells nutritional products and provides scientific information, to be "Lifeextension.com" rather than "LEF.org" as falsely asserted by opposer.<sup>10</sup> In particular, Mr. Gorsek noted that he accesses the website "Lifeextension.com" by typing in such name from opposer's magazine, which he regularly receives. In addition, his specific testimony with respect to whether he has ever even been to a website bearing the domain name "LEF.org" was that while he did "vaguely recall seeing that somewhere," he could not say when such was, answering instead that: "I don't know where." (Id.)

The record, in short, offers absolutely no proof of opposer's allegations in the notice of opposition that opposer, "since long prior to Applicant's use of LEF, has been continuously using, and is now using, the service mark and trade name LEF and the domain name [www.lef.org](http://www.lef.org) in connection with its business of providing nutritional and dietary supplements,

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<sup>10</sup> Referring, in a footnote in its reply brief, to Exhibit B which applicant attached to its trial brief, opposer further asserts that it is "[t]he domain [www.lef.org](http://www.lef.org) not lifeextension.com [which] is displayed on the cover of LEF's Life Extension magazine." Suffice it to say, however, that even if such exhibit were considered to be part of record herein, Exhibit B is a photocopy of such poor quality that a domain name of "[www.lef.org](http://www.lef.org)" simply cannot be definitely discerned. In any event, moreover, such exhibit bears a partial date of "2004," which is well after both applicant's claimed date of first use of its "LEF" mark and the filing date of its involved application.

nutritional counseling services and magazines, brochures and leaflets," much less that such use "has been valid and continuous since prior to Applicant's use of LEF and has not been abandoned" or that opposer, "since long prior to Applicant's use of LEF, has been continuously known as and is now known as LEF in connection with such business" and that such name "is symbolic of extensive good will and consumer and trade recognition built up by Opposer through substantial amounts of time and effort in advertising and promotion." Absent proof of priority of use, opposer cannot prevail in this proceeding even if the evidence of record were to demonstrate that there is also a likelihood of confusion.

Accordingly, because opposer, as the party bearing the burden of proof in this proceeding,<sup>11</sup> has not demonstrated that it is the owner of superior rights to those of applicant with respect to the mark "LEF" for nutritional supplements, the claim of priority of use and likelihood of confusion fails.

**Decision:** The opposition is dismissed; and the application is remanded to the Trademark Examining Attorney, pursuant to Trademark Rule 2.131, for reexamination as to whether applicant has in fact made bona fide use of its "LEF" mark in commerce.

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<sup>11</sup> See, e.g., *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988); *Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd.*, 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982); and *Clinton Detergent Co. v. Proctor & Gamble Co.*, 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962). It remains opposer's obligation to satisfy its burden of proof, irrespective of whether applicant offers any evidence.